

2 December 1947

MEMORANDUM FOR MR. BISHOP:

Subject: Basic Principles of Competitive System.

It seems to me that we are too willing to accept, without reason, the bald statement that the separation of units of an excessively concentrated industry will interfere adversely with production. If that be right or if we accept it as being right then we are departing from the fundamental philosophy of the concept of the free competitive system.

All the vast literature on this subject begins with the premise that competitive forces release productive capacity whereas monopolistic forces restrict productive capacity. For us to accept any other premise is to close our eyes to one of the largest bodies of economic-legal literature in existence. Moreover, I had assumed that it was the basic concept we were trying to bring to Germany.

Excessive economic power permits those who hold it to dictate the terms and conditions of the market, with no checks or restraints except their own conscience. It is historic that such a situation leads to restricted production and high cost. I can't conceive of anybody successfully disputing that concept.

That being the case I am always startled when we allow ourselves to be put on the defensive ~~of~~ defending an action which is designed to release production against a charge that it will interfere with production. Somebody has reversed the horse and cart on us, and we have let them do it. We are the ones who should be screaming about releasing productive capacity.

Let us consider the view of four representative authorities picked at random merely because this material is readily at hand.

Herbert H. Schell, Chairman of the Committee of International Relations, National Association of Manufacturers, than which there is no more conservative organization, said "no group of men has ever or ever will sit around a table and fix low prices. Free, competitive, private enterprise is the only instrument that fixes low prices." It is axiomatic that prices can be fixed only when production is controlled. We want production freed from such restraints.

Robert R. Watson, President of NAM and one of the leading businessmen of America, said that monopolies "are defensive mechanisms. They represent weakness, not strength." They are afraid, he said, "to meet their own or other competition. Their basic method of control always begins with restricted production. It is traditional enemy of the free enterprise system.

Robert Leifman, a recognized German authority on cartels, drew a parallel between American and German systems. The difference, he said, was that American firms competed to produce a better article at a lower price, thus

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stimulating production, whereas German firms sought by artificial controls to establish prices which would permit production during periods of falling prices without loss or profit. That an effective decartelization program will interfere with profits is something I am prepared to admit. An economic study will reveal, I think, that profits in Germany have been incredibly high. It is no obligation of ours to protest monopoly profits.

Corwin Edwards, who succeeded me as Chairman of the Policy Board of the Antitrust Division, in testimony before the Senate War Mobilization Committee pointed out that monopolies and cartels "are designed to enhance profits by reducing competition". Competition is reduced either by gaining dominance over a market or by agreement with others. The effect of both is to regulate production. And that always means lower production. Consider the critical shortages which developed and crippled our war production. All of them were in or related to monopolistic conditions - aluminum, opticals, machine tools, the Phillips screws, certain building materials, ignition equipment, paint, shoes. And then consider the fantastic scale of production reached by the competitive enterprises such as the automotive industry, the clothing industry, the watch making industry and the heavy machine industry. The comparison stands out in irrefutable boldness.

And Supreme Court decisions in Antitrust cases are filled with acceptance of the theory that monopoly domination leads toward low production and high prices. I have heard of no one except Lord McGowan, Chairman of the Board of Imperial Chemical Ltd., who openly argued that monopolies and cartels were good, because they regulated production and prevented cut-throat competition, and even he admitted the effect which we are somehow being forced to defend.

Of course Germany is now faced with an economy of scarcity. Under such conditions it is not necessary to limit production. But that is only one cycle of a continuing economy. If separation of a monopoly into competing units would adversely affect production at this time, then the question raised is merely when the execution of the separation is carried out, not the merits of the separation itself. However, even as to the timing of the execution, the burden should be clearly placed on the enterprise since the best time for competitors to get started in the industry is during periods of scarcity.

It seems to me equally clear that the only remedy for excessiveness is separation, supported by the basic concept that our chief mission is to provide competition within industries where excessiveness is found.

If that is so, and I have heard no one attempt to dispute it, then what do we have in the Henschel case? We have the following situation:

- a) Everybody is willing to find Henschel und Sohn GmbH, Kassel, an excessive concentration.
- b) Having found it excessive it is suggested that some other remedy may be devised short of separation.

- c) It is further suggested that separation and the introduction of competition would reverse the traditional concept by restricting production.
- d) In reliance on that reversionary doctrine it is then suggested that we have other agencies, not charged with the enforcement of this law nor supposed to understand its concept, make an investigation for the purpose of determining whether or not separation is advisable. (I can write that report today if you are in a hurry for it.)
- e) If a difference arose between those other agencies and ourselves, which I would regard with the same certainty as the likelihood of differences between a cat and a dog, then we are to take the issue to General Clay who will thereby be forced to take personal responsibility.
- f) If he takes that responsibility then what is left for the Board of Appeals to do? Can it come along later and overrule General Clay? If it cannot, then our elaborate machinery is a fiction. If it can, then General Clay is a fiction. I shouldn't think he would like that and I am certain I don't either.

I think it must be assumed that we are the designated agency to enforce this law because we are supposed to be familiar with the guiding philosophy behind it, the basic concepts on which it is predicated, the techniques of enforcing it and the measures of relief necessary to bring about compliance in the public interest. Any different or less assumption is merely a confession of inadequacy. Consequently, it seems to me that our role is very clear. We should make our record and our determination, refusing to yield beyond the point of minimum standards for bringing enterprises into compliance. We must, of course, submit to any review that higher authority imposes on us, although pointing out that no such review is imposed on other agencies. A man can be put on trial for his life merely by indictment by the Office of Chief Counsel, but we can't put an enterprise on trial for the divestiture of some property without prior clearance from three Divisions and the British. Does this indicate to the Germans that the American conception of values places property above life? Certainly there is no precedent at home to support such a conception.

Even during the full production period of the war antitrust cases were filed right along, but in some instances the trial was postponed - never, as some have contended, called off. We, likewise, are dealing with an economy of necessary full production, but the most to be gained or lost by consulting outside agencies should be the timing of the execution. And then it should be the clear obligation of the objecting agency to prove beyond a reasonable doubt that the execution of the remedy sought would materially affect essential production. To require any less burden of proof means that another agency, without responsibility for enforcing the law, has the final power for determining the measures of enforcement.

I have no objection to the existence of a Board of Appeals which can publicly, on the record, overrule us. I have no objection to a Board of Survey which can publicly, on the record, postpone the execution of our actions on the grounds that it would interfere with other and more important Military Government policy. But I strongly object to any arrangement which passes our authority to others and produces in our name an inadequate remedy.

Our greatest weakness up to now, I am afraid, is that we have never settled on any minimum standards as to what the law means for us to do. We go through a regular routine of bickering over details, arguing over meanings and form, and reversing ourselves on positions already taken. This is inevitable so long as we try to proceed without some standards. I should think the following standards as to form and substance might be acceptable and serve as guides until we develop some case history:

- a) Although other agencies and bodies might have the power to overrule us or order a stay of execution none shall dictate the remedy which we feel is necessary to comply with the law.
- b) The basic concept of our action shall be to free industry from restrictive and limiting conditions through the institution of competitive sources within that industry.
- c) The only remedy for a finding of excessiveness by reason of size is separation and divestiture so as to provide competition within and among the facilities available for production.
- d) A recognition that the greatest intrenchment of the monopolistic position comes in times of scarcity, and that the best time for a competitor to get a foothold in the industry is during similar periods.
- e) The only regulated alternative to private control is government control, and we are against both with equal vigor. We will accept nothing which is not predicated on the principle of man's desire for profit in a free competitive market.

Undoubtedly other and better standards can be suggested. But the point is that we need some guiding principles on which we as a Branch and the individual members thereof can take our stand and know beyond doubt that all of our associates are likewise standing there.

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